

January 1989

## Admission and Reinstatement of Felons to the Bar: West Virginia and the General Rule

Leonard Copeland

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Legal Profession Commons](#)

---

### Recommended Citation

Leonard Copeland, *Admission and Reinstatement of Felons to the Bar: West Virginia and the General Rule*, 91 W. Va. L. Rev. (1989).

Available at: <https://researchrepository.wvu.edu/wvlr/vol91/iss2/8>

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## ADMISSION AND REINSTATEMENT OF FELONS TO THE BAR: WEST VIRGINIA AND THE GENERAL RULE

I.	INTRODUCTION.....	451
II.	READMISSION STANDARDS APPLICABLE TO FELONS IN WEST VIRGINIA.....	455
	A. <i>Early Reinstatement Cases in West Virginia</i> .....	455
	B. <i>Recent Reinstatement Cases in West Virginia</i> .....	458
III.	HISTORICAL OVERVIEW OF REINSTATEMENT LAW .....	468
	A. <i>Early Cases—Principles and Practice</i> .....	468
	B. <i>Recent Trend—Principles and Policies</i> .....	470
IV.	ADMISSION OF FIRST-TIME APPLICANTS WITH FELONY RECORDS .....	473
	A. <i>What Standards Determine Good Moral Character?</i> .....	473
	1. Examples of Standards Considered By Courts .....	473
	2. Key Factors Considered By Courts In Ad- missions Proceedings .....	477
	3. Constitutional Limitations on Admissions Standards .....	479
	4. What Offenses Involving Moral Turpitude May Preclude Admission to the Bar?.....	481
	B. <i>The General State of the Law</i> .....	483
V.	CONCLUSION.....	484

### I. INTRODUCTION

High moral character and legal competence are fundamental prerequisites for admission to the practice of law.<sup>1</sup> It necessarily

---

1. See, e.g., W. VA. CODE OF RULES FOR ADMISSION TO THE PRACTICE OF LAW (1988) which require 1) completion of a full course of study in an A.B.A. accredited law school, 2) completion of an A.B. or B.S. degree, 3) completion of an LL.B. or J.D., 4) successful completion of the bar examination, and 5) good moral character.

The MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-2 (1981) states that “[t]he public should

follows that first-time applicants with past felony convictions and attorneys who seek reinstatement after disbarment for a felony conviction must also possess these characteristics to be authorized to practice.<sup>2</sup> A felony conviction has an uncertain affect on the likelihood of admission. The uncertainty affects the first-time applicant and the petitioner for reinstatement alike. Although a felony conviction results in mandatory disbarment in most states,<sup>3</sup> this denial of the "right" to practice law is not necessarily permanent.<sup>4</sup> Moreover, a felony conviction does not automatically preclude an initial applicant from admission to the bar.<sup>5</sup> A felony conviction is just one factor that courts and state bar associations consider when reviewing applications for admission or readmission.<sup>6</sup> A felony conviction is, however, one factor that suggests unfitness to practice law because it provides an inference of bad moral character.<sup>7</sup>

Felonies have traditionally been considered crimes of moral turpitude<sup>8</sup> that indicate a moral flaw in a person's character.<sup>9</sup> It is

---

be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards . . . ." (footnotes omitted)

DR 1-101 (B) of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981) states that "[a] lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute."

2. See generally, Annotation, *Falsehood, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing On Requisite Good Moral Character for Admission to Bar*, 30 A.L.R. 4TH 1020, § 4 (1984); Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 88 A.L.R. 3D 192, § 2 (1978); Annotation, *Reinstatement of Attorney After Disbarment, Suspension, or Resignation*, 70 A.L.R. 2D 268, § 20 (1960); *In re Boone*, 90 F. 793 (C.C. N.D. Cal. 1898).

3. Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489, 490 (1958).

4. Annotation, *Reinstatement of Attorney After Disbarment, Suspension, or Resignation*, 70 A.L.R. 2D 268, §§ 2-3 (1960).

5. See, e.g., 7 AM. JUR. 2D *Attorneys at Law* § 16 (1980).

6. *Id.* See also Annotation, 70 A.L.R. 2D *Reinstatement of Attorney* 268, § 2 (1960).

7. *In re O'Connell*, 199 Cal. 538, 250 P. 390 (1926); *In re Manville*, 538 A.2d 1128 (D.C. 1988) (citing *In re Manville*, 494 A.2d 1289, 1295-96 (D.C. 1985)); *In re Glucksman*, 57 A.D.2d 205, 394 N.Y.S.2d 191 (1977), *appeal denied*, 42 N.Y.2d 804, 398 N.Y.S.2d 1025, 367 N.E.2d 658 (1977).

8. The West Virginia Supreme Court of Appeals defined "moral turpitude" in *Committee on Legal Ethics of the W. Va. State Bar v. Scherr*, 149 W. Va. 721, 726, 143 S.E.2d 141, 145 (1965) (citing 58 C.J.S. *Morals* at 1201 (1948)), as "an act of baseness, vileness or depravity in the duties which one person owes to another or to society in general, which is contrary to the usual, accepted and customary rule of right and duty which a person should follow."

9. Historically, once a person was convicted of a crime involving moral turpitude, that person's character was considered permanently tainted. That view is reflected in the statement that "[t]he public

difficult for an applicant to overcome the stigma of a felony conviction and persuade the state bar and the state supreme court to grant admission to the bar.<sup>10</sup> Therefore, the petitioner for reinstatement, who is a convicted felon, has a heavier burden to prove fitness than a first-time applicant who has no criminal record.<sup>11</sup> Of course, the first-time applicant with a felony conviction must also bear the burden of showing rehabilitation, which is not borne by the applicant without a criminal record.<sup>12</sup>

The review process for admission or reinstatement of convicted felons to the bar involves balancing the interests of individual justice against the need to preserve the integrity of the bar.<sup>13</sup> The courts' primary interests are those of protecting the public from unscrupulous lawyers and serving the public interest by impartially administering justice.<sup>14</sup> Courts are not unmindful of the need for justice for the individual who has undergone genuine reformation. However, they place supreme importance upon their duty to protect the public.<sup>15</sup>

The balancing process does not, however, lend itself well to application of clear-cut guidelines; therefore, courts generally avoid

---

have [sic] a right to demand that no person shall be permitted to aid in the administration of justice whose character is tainted with dishonesty, corruption, crime . . . ." *Cohen v. Wright*, 22 Cal. 293, 320 (1863).

Another theory viewed character as a set of consistent character traits. "Moral and religious philosophers since Aristotle have presupposed the existence of determinate character traits, leading to virtuous and nonvirtuous behavior. Much of the early work in psychology theory began from the premise that fundamental personality dispositions governed social conduct." Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 556-57 (1985) (footnotes omitted) [hereinafter Rhode].

10. *In re Brown*, 166 W. Va. 226, 273 S.E.2d 567 (1980). A petitioner must demonstrate a record of rehabilitation sufficient to prove to the court that there is little likelihood of a repeat of unprofessional conduct. "In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice, and in this regard the seriousness of the conduct leading to disbarment is an important consideration." *Id.* at 234, 273 S.E.2d at 571. See also *State v. Russo*, 230 Kan. 5, 9, 630 P.2d 711, 714 (1981).

11. *Brown*, 166 W. Va. at 234, 273 S.E.2d at 571. The Supreme Court of Appeals noted that in order to overcome the adverse effect of a prior disbarment, an applicant must demonstrate a record of rehabilitation. In addition, the Supreme Court of Appeals commented that the more serious the original offense the harder it would be for the applicant to prove present fitness.

12. *Manville*, 538 A.2d 1134 n.7 (quoting *In re Manville*, 494 A.2d 1289, 1295 (D.C. 1985)).

13. See, e.g., *In re Stump*, 272 Ky. 593, 596, 114 S.W.2d 1094, 1096 (1938); *In re Raimondi*, 285 Md. 607, 618, 403 A.2d 1234, 1239 (1979), cert. denied, 444 U.S. 1033 (1980).

14. *Stump*, 272 Ky. at 596, 114 S.W.2d at 1096; *Raimondi*, 285 Md. at 618, 403 A.2d at 1234.

15. Annotation, *Reinstatement of Attorney*, 70 A.L.R.2d 268, § 9 (1960).

the enunciation of hard-and-fast rules.<sup>16</sup> Instead, courts apply broad principles and judge each case on its own facts.<sup>17</sup> One source of difficulty is the determination of what constitutes good moral character.

The good moral character requirement has generated much discussion because of its ambiguous and inherently subjective nature.<sup>18</sup> As evidence of the subjectivity of the standard, some courts refuse to consider any offense so grave as to automatically preclude fitness,<sup>19</sup> while other courts hold that the most egregious offenses may forever bar a person from the practice of law.<sup>20</sup>

This article will examine the subject from two angles: 1) from the standpoint of admission of first-time applicants with criminal records, and 2) from the standpoint of reinstatement of attorneys disbarred for a felony conviction.

First, this article will survey the historical development of the principles and practices in West Virginia reinstatement law and determine whether a felony conviction might currently operate as a permanent bar to reinstatement. West Virginia law will be compared to the general rule and, where possible, will be identified as consistent or inconsistent with the majority view.

Second, this article will examine the issues related to bar applicants who suffered felony convictions or indictments prior to initial application for admission. General standards for admission of felons will be discussed, then compared and contrasted to the principles for readmission.

---

16. The author observed that "[h]ard and fast rules . . . are inappropriate in this area, particularly since evidence of rehabilitation plays an important role in good moral character cases involving past illegal conduct." McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67, 89 (1984).

17. *In re Harrington*, 367 A.2d 161, 163 (Vt. 1976).

18. See, e.g., McChrystal, *supra* note 16; Rhode, *supra* note 9; Comment, *Past Crimes and Admission to the Bar*, 5 J.LEGAL PROF. 179 (1980) (authored by Laura Gunn); Comment, *Admission to the Bar — "Good Moral Character" — Constitutional Protections*, 45 N.C.L. REV. 1008 (1967) (authored by Wallace C. Tyser, Jr.); Comment, *Bar Examinations: Good Moral Character, and Political Inquiry*, 1970 WIS. L. REV. 471 (authored by Moria C. Mackert).

19. See, e.g., *In re Hiss*, 368 Mass. 447, 452, 333 N.E.2d 429, 433 (1975).

20. See, e.g., *In re Rothenberg*, 108 Ill.2d 313, 326, 484 N.E.2d 289, 295 (1985); *In re Wolff*, 173 La. 257, 136 So. 583 (1931).

## II. READMISSION STANDARDS APPLICABLE TO FELONS IN WEST VIRGINIA<sup>21</sup>

### A. Early Reinstatement Cases in West Virginia

An early case involving a petition for reinstatement of an attorney disbarred as a result of a criminal conviction is *In re Daugherty*.<sup>22</sup> In *Daugherty*, the West Virginia Supreme Court of Appeals held that reinstatement is, in general, within the "sound discretion of the court passing upon the application. An applicant for reinstatement must, like a candidate for admission to the bar, satisfy the court that he is a fit person to be entrusted with the privilege of practicing law."<sup>23</sup> The court held that the "deciding question" is "whether the applicant is of good moral character."<sup>24</sup>

The Supreme Court of Appeals distinguished, however, a court's inherent power to admit an attorney to its bar and disbar an attorney

21. The By-Laws of the West Virginia State Bar do not mandate special discipline for the commission of felonies *per se*. Rather, "[a]ny court in which any attorney shall be convicted of any crime involving moral turpitude or professional unfitness shall, as a part of the judgment of conviction, annul his license to practice law." W. VA. BAR BY-LAWS, art. 6, § 23 (1988). Felonies are usually considered crimes involving moral turpitude, and disbarment is generally reserved for offenses of moral turpitude. Therefore, for purposes of this article, and except where otherwise noted, reinstatement after any disbarment will be considered equivalent to reinstatement after disbarment because of a felony conviction.

22. *In re Daugherty*, 103 W. Va. 7, 136 S.E. 402 (1927). The issues involved whether the petitioner had been convicted of a felony or a misdemeanor and whether the Circuit Court of Cabell County was authorized under the West Virginia Code to prevent the petitioner from practicing in other circuit courts if the petitioner had been convicted of a misdemeanor. The West Virginia Supreme Court of Appeals cited *State v. McClaugherty*, 33 W. Va. 250, 10 S.E. 407 (1889), wherein the court interpreted section 6, chapter 119, of the West Virginia Code (1887) as granting the Supreme Court of Appeals or any circuit or county court authority to permanently and absolutely annul an attorney's license to practice in all courts of the state upon conviction of a felony.

The Supreme Court of Appeals affirmed the Cabell County Circuit Court's order which denied the petitioner's reinstatement to practice before it, but reversed the circuit court's order insofar as it purported to inhibit the petitioner from practicing in courts outside Cabell County. The Supreme Court of Appeals reasoned that section 215 of the federal Criminal Code, which the petitioner was convicted of violating, was not defined by the statute as a felony, nor was the offense a common law felony; therefore, the offense must be classified a misdemeanor.

The Supreme Court of Appeals held, therefore, that the Cabell County Circuit Court did not have the authority to disbar or suspend the petitioner from practicing law in courts outside Cabell County. Annulment of an attorney's license to practice in all courts is absolute and may not be exercised without statutory authorization.

23. *Daugherty*, 103 W. Va. 7, 136 S.E. 402.

24. *Id.*

from its bar from the statutory power to annul an attorney's license to practice law. The former power affects only the attorney's right to practice in a particular court whereas the latter power affects an attorney's right to practice anywhere in the state where the license was issued.

The holding in *Daugherty* made clear that a court has the inherent power to reinstate an attorney who has suffered a common-law disbarment for misconduct. The holding did not make clear, however, whether the state's courts had the power to reinstate a convicted felon whose license had been statutorily annulled. Furthermore, the Supreme Court of Appeals did not address whether a felon whose license had been annulled could even apply for a new license and petition for reinstatement. A reasonable interpretation of the opinion would be that statutory annulment of an attorney's license to practice is absolute and final, without any provision for future restoration or replacement.<sup>25</sup>

Subsequent to the 1931 revision of the West Virginia Code, the West Virginia Supreme Court of Appeals addressed some of these issues when it answered certified questions from the Circuit Court of Kanawha County in *Ex Parte Mitchell*.<sup>26</sup> Although the offenses for which the petitioner was disbarred were not specified in the opinion, the court noted that the original disbarment was based on seven counts of malpractice and was instituted under Chapter 30, Article 2, Section 7 of the West Virginia Code (hereinafter W. Va. Code).<sup>27</sup>

The Supreme Court of Appeals found that the circuit court had annulled the license of the petitioner and had not merely disbarred

---

25. The basis for this "reasonable" interpretation is the quotation from *McClaugherty*, 33 W. Va. at 257, 10 S.E. at 409, which interpreted section 6 of chapter 119 of the West Virginia Code of 1887 to apply "only to cases the object of which is to suspend or annul the license of an attorney absolutely and in all courts . . . ." *Daugherty*, 103 W. Va. at 10, 136 S.E. at 403. In addition, by interpreting the federal offense to be a misdemeanor and holding, therefore, that the statute did not apply, the Supreme Court of Appeals appears to have been attempting to avoid the harshness of a mandatory and permanent state-wide disbarment.

26. *Ex parte Mitchell*, 123 W. Va. 283, 14 S.E.2d 771 (1941). The petitioner in this case had been disbarred by the Circuit Court of Kanawha County pursuant to chapter 30, article 2, section 7 of the West Virginia Code. This statute authorizes the Supreme Court of Appeals or any West Virginia court of record to annul an attorney's license to practice law upon conviction of malpractice.

27. *Id.*

the petitioner from practice; therefore, the circuit court was without jurisdiction to alter or set aside the disbarment order after it had "become final by adjournment of the court for the term at which it was entered . . . ." <sup>28</sup> Upon annulment of the petitioner's license, the attorney's license was "totally terminated for all purposes, and incapable of revitalization . . . . [T]hese statutes make no provision for the restoration or reinstatement of such license, certificate or registration after revocation or annulment." <sup>29</sup>

The Supreme Court of Appeals did not expressly reject the proposition that an attorney could be relicensed and reinstated after suffering an annulment. However, by pointing out the lack of statutory provision for "restoration or reinstatement of such license," <sup>30</sup> the court appeared to implicitly hold that an attorney who was statutorily disbarred subsequent to a felony conviction would be permanently precluded from readmission to the practice of law.

Moreover, even though the Supreme Court of Appeals listed three successive steps necessary for admission to the practice of law, <sup>31</sup> the court made no mention of standards or principles upon which to base consideration for readmission. Unfortunately, the narrowness of the issue prevented the court from clearly stating the ultimate fate of a disbarred convicted felon, but a reasonable interpretation of the court's holdings allows the conclusion that a convicted felon would be permanently barred from readmission to the practice of law based on the operation and interpretation of the statutes of West Virginia.

---

28. *Id.* at 283, 14 S.E.2d at 771.

29. *Id.* at 289-90, 14 S.E.2d at 774.

30. *Id.*

31. At the time of this opinion, three successive steps were required to practice law:

(1) A certificate from the circuit court that the applicant is twenty-one years of age, of good moral character, and a resident of the county for one year next past; (2) a license to practice law, or a diploma from the college of law of West Virginia University; and (3) an actual admission to the bar of a court of record and the taking of the required oath.

*Mitchell*, 123 W. Va. at 289, 14 S.E.2d at 773.

Note, however, that the West Virginia Supreme Court of Appeals abolished the diploma privilege by rules adopted in 1985 and amended in 1986. W. VA. CODE OF RULES FOR ADMISSION TO THE PRACTICE OF LAW Rule 1.2 (1988). Students graduating from the West Virginia College of Law after July 1, 1988, must pass the bar examination to be admitted to the bar.



## B. Recent Reinstatement Cases in West Virginia

When the West Virginia Supreme Court of Appeals decided *In re Daniel*,<sup>32</sup> it clearly held that an attorney whose license to practice law had been annulled could subsequently apply for another license and seek readmission. The court stated that “[a]lthough an annulment forever terminates the license held by the attorney at the time it was annulled, it does not prohibit the application by such an attorney for a new license to practice law as if he had never been issued a license.”<sup>33</sup> The court agreed with the general rule that disbarment or annulment is not final and affirmed the position that the burden rests on the petitioner to show rehabilitation and good moral character.<sup>34</sup>

The *Daniel* court also held that the court might require that certain conditions be met before the license is reissued, even after a showing of good moral character by the petitioner.<sup>35</sup> However, the procedure for reapplication for a license delineated in *Daniel* is

32. *In re Daniel*, 153 W. Va. 839, 173 S.E.2d 153 (1970). Although disbarment was not a result of a felony conviction in this case, the license of the petitioner had been annulled as a result of incidents of serious malpractice; therefore, the petitioner was in the same situation as a convicted felon who would be seeking a new license subsequent to an annulment.

33. *Id.* at 844, 173 S.E.2d at 156 (citations omitted). At the time this case was argued, there was considerable confusion and disagreement as to the right of an attorney to reapply for a new license after an annulment. The initial position of the Committee on Legal Ethics of the West Virginia State Bar was that an annulled license was forever terminated. The Committee conceded, however, that the Petitioner stood in the same position as one who never had a license to practice law and only needed to comply with the established rules for admission to seek a new license.

When the Petitioner thereafter attempted to show compliance with the statutory rules for admission, the Committee changed its position. The Committee then took the position that Part H, Article VI, § 31 of the WEST VIRGINIA STATE BAR BY-LAWS prohibited an attorney whose license had been annulled from seeking readmission. The Committee based its position on the contention that the admission requirements of chapter 30, article 2, section 1 of the West Virginia Code did not apply to a person who once possessed a license that was later annulled.

The dissent agreed with the Committee and argued sharply that the admission rules set out in chapter 30, article 2, section 1 of the West Virginia Code applied only to first-time applicants, as evidenced by the age requirement. *Daniel*, 153 W. Va. at 847, 173 S.E.2d at 157 (Browning, President, dissenting).

The dissent argued, further, that Article VI, Part H, § 31, of the West Virginia State Bar By-Laws provided not only for permanent license annulment but also for irrevocable termination of the right to practice law in the state. The basis for the dissent's argument was the fact that the article did not “contemplate any subsequent application by an attorney whose license had been revoked and forever terminated.” *Daniel*, 153 W. Va. at 847, 173 S.E.2d at 157.

34. *Id.* at 844, 173 S.E.2d at 156.

35. *Id.*

straight-forward and does not appear to be onerous if the petitioner can satisfy the statutory requirements in W. Va. Code § 30-2-1 and demonstrate that he possesses good moral character.<sup>36</sup> The West Virginia Supreme Court of Appeals merely reasserted its “inherent power to supervise, regulate and control the practice of law in [West Virginia, including its] inherent power to grant or refuse the license to practice law . . . .”<sup>37</sup>

At the time of the *Daniel* opinion, the Supreme Court of Appeals still had not established standards by which to judge the qualifications of petitioners for reinstatement to the bar following a license annulment.

In 1979, the West Virginia Supreme Court of Appeals amended the By-Laws of the West Virginia State Bar and subsequently decided *In re Brown*.<sup>38</sup> In *Brown*, the Supreme Court of Appeals found it necessary to explain the procedures for reinstatement and clarify the theory of license reinstatement following an annulment resulting from a felony conviction.<sup>39</sup> The *Brown* court also instituted formal procedures to review license reinstatement petitions and laid the foundation for the adoption of standards by which to review them.<sup>40</sup>

The *Brown* court held, in particular, that Article VI, § 35 of the West Virginia State Bar By-Laws “provides the right for a disbarred attorney to petition this Court for license reinstatement after five years have elapsed since the date of his disbarment.”<sup>41</sup> Reading sec-

---

36. *Id.*

37. *Id.* at 842, 173 S.E.2d at 155.

38. *In re Brown*, 164 W. Va. 234, 262 S.E.2d 444 (1980). In this case, the petitioner sought reinstatement of his license to practice law. The petitioner's license had previously been temporarily suspended pending the outcome of an appeal in the Fourth Circuit Court of Appeals of his conviction for conspiracy to commit bribery and bribery of a juror. Upon affirmation of the conviction, the petitioner's license was annulled by order of the court on December 21, 1973. See *In re Brown*, 157 W. Va. 1, 197 S.E.2d 814 (1973).

39. The petition for reinstatement was before the court, along with an answer filed by the Committee on Legal Ethics. Because the Ethics Committee believed no evidentiary hearing was necessary in order to petition for reinstatement after a five-year disbarment period, no evidentiary hearing was held before the petition for reinstatement had been filed with the court. The case, therefore, was remanded to the Committee on Legal Ethics to conduct such a hearing. *Brown*, 164 W. Va. 234, 262 S.E.2d 444.

40. *Id.*

41. *Id.* at 235, 262 S.E.2d at 445.

tions 35 and 4 of Article VI *in pari materia*, the court decided under its supervisory powers that "the Committee on Legal Ethics of The West Virginia State Bar shall hold an evidentiary hearing to [make] a record [of] the issue relating to the petitioner's qualifications to have his license reinstated."<sup>42</sup> The petitioner may or may not request a hearing before the Supreme Court of Appeals, but, if the petition is made, the court will then make its decision whether to deny or grant the petition and may premise reinstatement upon "such terms and conditions" as it deems necessary.<sup>43</sup>

As a justification for the additional procedures, the Supreme Court of Appeals noted that "courts have traditionally cast a heavy burden on the petitioning attorney to demonstrate his fitness for reinstatement."<sup>44</sup> The court reiterated that "[t]he ultimate question is whether he possesses the integrity, high moral character and legal competence to justify the reinstatement of his license."<sup>45</sup>

Without expressly adopting the factors, the West Virginia Supreme Court of Appeals listed the factual inquiries specified by the Supreme Judicial Court of Massachusetts in the case of *In re Hiss*.<sup>46</sup> The *Hiss* factors are commonly used to judge whether a petitioner has met the burden of proof on the requirements for reinstatement. These factors are:

- (1) the nature of the original offense for which the petitioner was disbarred, (2) the petitioner's character, maturity, and experience at the time of his disbarment, (3) the petitioner's occupations and conduct in the time since his disbarment, (4) the time elapsed since the disbarment, and (5) the petitioner's present competence in legal skills.<sup>47</sup>

The West Virginia Supreme Court of Appeals included one caveat in the procedures it established. The court held that even though it approves the By-Laws per W. Va. Code § 51-1-4a, approval does not mean that the By-Laws "become the sole standard to define

---

42. *Id.* at 240, 262 S.E.2d at 447.

43. *Id.* at 236, 262 S.E.2d at 445.

44. *Id.* at 237, 262 S.E.2d at 445.

45. *Id.* at 237, 262 S.E.2d at 446.

46. *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975).

47. *Brown*, 164 W. Va. at 237-38, 262 S.E.2d at 446 (quoting *Hiss*, 368 Mass. at 460, 333 N.E.2d at 437-38 (citations omitted)).

and control the practice of law and regulate the conduct of attorneys.”<sup>48</sup> The court expressly declined to hold that the By-Laws are the “only source of power” to regulate the practice of law, as that would constitute an abdication of the court’s inherent responsibilities and its express mandate under W. Va. Code § 51-1-4a.<sup>49</sup>

*Brown* established the proposition that disbarred attorneys are entitled to a full and fair hearing when petitioning for reinstatement. In order to provide a full hearing, the Supreme Court of Appeals must implement procedures to produce a better factual record and adopt better standards by which to judge petitions for reinstatement.

The court will, however, jealously guard its ultimate, inherent rule-making and decision-making power over the practice of law in general, and reinstatement of disbarred attorneys in particular. Even though formal review procedures are mandated, the court, nevertheless, can require more than what is mandated because of its ability to exercise its discretionary power over the bar. The Supreme Court of Appeals will not be bound by the rules if it feels justice requires deviation.

Late in the same year in which *Brown* was decided, the West Virginia Supreme Court of Appeals decided *In re Smith*.<sup>50</sup> In *Smith*, the Supreme Court of Appeals had the opportunity to review a petition for reinstatement using the standards cited in *Brown* and its recently established procedural framework for providing an evidentiary record.

---

48. *Id.* at 239, 262 S.E.2d at 447.

49. *Id.*

50. *In re Smith*, 166 W. Va. 22, 270 S.E.2d 768 (1980) (opinion withdrawn). The petitioner’s license was annulled after his felony conviction had been affirmed by the United States Supreme Court. The report of that proceeding is in *In re Smith*, 158 W. Va. 13, 206 S.E.2d 920 (1974). The petitioner was convicted of violating 18 U.S.C § 241, which makes it a federal crime to conspire to “stuff” ballot boxes with fraudulent and fictitious ballots.

Note that *Smith*, 166 W. Va. 22, 270 S.E.2d 768 (1980) (opinion withdrawn), granted reinstatement on October 7, 1980, and was withdrawn November 25, 1980, due to misstatements of law in the opinion. Nevertheless, the opinion established the standards used to judge reinstatement petitions. A revised opinion was refiled on November 25, 1980, as a slip opinion. Hereinafter, the published reporters will be cited wherever the language is identical to the revised opinion, otherwise, the slip opinion will be cited.

The majority's decision to reinstate the petitioner's license elicited an exceptionally vehement dissent by Justice Miller<sup>51</sup> and appears to be an aberration in the jurisprudence of reinstatement when a license has been annulled due to a conviction of a felony or other crime of moral turpitude.

The majority opinion, written by Chief Justice Neely, called Article VI, § 35 of the West Virginia State Bar By-Laws a "rule of compassion"<sup>52</sup> in that it provides for reapplication for a license to practice law by an attorney whose license has been annulled. Even though the court implied that it may be possible for an offense to be so serious as to preclude reinstatement,<sup>53</sup> the court gave only a slight indication of what type of offense might preclude such a possibility. Instead, Justice Neely asserted that the concept of permanent disbarment had been rejected since *In re Daniel*.<sup>54</sup> Moreover, the court held that permanent disbarment is a disproportionate punishment which must surrender whenever rehabilitation can be demonstrated for the statutory five-year period.<sup>55</sup>

The standard for rehabilitation was not intended to make reinstatement impossible to attain. Rather, the standard was designed to make proof of rehabilitation a realistic possibility.<sup>56</sup> Therefore, upon proof of rehabilitation for the statutory period, the court would ordinarily grant reinstatement. The court likens the requisite five-year rule to ordinary situations where an individual has had his

---

51. Justice Miller disagreed with nearly every holding of the majority as well as the majority's rejection of the Ethics Committee's unanimous recommendation to deny reinstatement at this time. *Smith*, 166 W. Va. at 32, 270 S.E.2d at 774 (1980) (Miller, J., dissenting). In short, the only issue on which the dissent appears to implicitly concur with the majority is the issue that the Petitioner might be entitled to reinstatement upon a proper showing of rehabilitation. Otherwise, the dissent considered the majority opinion "a disservice to the legal profession, the public at large, and to the courts . . . ." *Id.* at 40, 270 S.E.2d at 778.

52. *Id.* at 32, 270 S.E.2d at 774.

53. The court said, "[t]here are obviously occasions where the underlying offense which caused the loss of a license is so serious that the Court cannot be confident that the petitioner is sufficiently rehabilitated that the public will be adequately protected. This is particularly the case where the underlying offense was directly related to the practice of law." *In re W. Bernard Smith*, No. 13493, slip op. at 9 (W. Va. Nov. 25, 1980).

54. *Smith*, 166 W. Va. at 25, 270 S.E.2d at 770 (citing *In re Daniel*, 153 W. Va. 839, 173 S.E.2d 153 (1970)).

55. *Id.* at 26, 270 S.E.2d at 771.

56. *In re W. Bernard Smith*, No. 13493, slip op. at 9, 10 (W. Va. Nov. 25, 1980).

citizen's rights restored after conviction of a crime and completion of a sentence.<sup>57</sup>

In the final analysis, the court adopted and applied the *Hiss* standards introduced in the earlier *Brown*<sup>58</sup> opinion. The court held the petitioner's offense "reprehensible, but . . . completely unrelated to the petitioner's law practice or activities as an officer of the Court."<sup>59</sup> The factors regarding the petitioner's character, maturity, and experience at the time of the disbarment were of no consequence in the court's decision. The court held that these factors are applicable only in the case of a youthful offender.<sup>60</sup>

The court considered the petitioner's occupation during the time after his disbarment and held it to be "honorable" and "acceptable," notwithstanding his lack of regular gainful employment.<sup>61</sup> The petitioner's independent means of support lessened the importance normally placed on gainful employment during disbarment. Another factor weighing in favor of the petitioner was the fact that the petitioner kept abreast of current developments in law and legal literature in general.<sup>62</sup>

The Supreme Court of Appeals ultimately held that, without a showing by the Committee on Legal Ethics that reinstatement will endanger the public, an attorney's license to practice law will be reinstated after five years of good behavior, unless the original offense was so serious that even a record of honest living will not assure safety to the public.<sup>63</sup> The standards for judging reinstatement applications appeared to be settled, notwithstanding the apparent aberration of the *Smith* decision. However, the location and the nature of the burden of proof were still not clear. Justice Miller maintained very persuasively in his dissenting opinion that the bur-

---

57. "The five year rule is consistent with other decisions of this Court regarding restoration of rights after an individual has been convicted of a crime and served his sentence." *Smith*, 166 W. Va. at 27, 270 S.E.2d at 771.

58. *In re Brown*, 164 W. Va. 234, 237, 262 S.E.2d 444, 446 (1980).

59. *Smith*, 166 W. Va. at 31, 270 S.E.2d at 773.

60. *Id.*

61. *Id.*

62. *Id.* at 32, 270 S.E.2d at 773.

63. *In re W. Bernard Smith*, No. 13493, slip op. at 12 (W. Va. Nov. 25, 1980).

den of proof must remain on the petitioner to prove more than mere honorable behavior during the five-year disbarment to warrant reinstatement.<sup>64</sup>

Several questions were not resolved by the *Smith* case: 1) what kind of felony or other crime of moral turpitude would warrant permanent disbarment, if any, and 2) how will the criteria be applied in future reinstatement cases of former convicted felons? Given the *Smith* holding and the burden of proof debate, prediction of future outcomes would have been difficult. The uncertainty was ironic after the recent development of the readmission standards and procedures.

Less than three months after the *Smith* case, the court decided *In re Brown*.<sup>65</sup> *Brown* involved the reapplication of Bonn Brown to the practice of law.<sup>66</sup> This case is especially important because it clarified points of law which were thought to be misstated and left unclear by the *Smith* opinion<sup>67</sup> and established relatively clear standards by which to judge reinstatement petitions of convicted felons.

In contrast to the opinion in *Smith*, Justice Miller's opinion in *Brown* thoroughly reviewed the relevant case law of West Virginia and other jurisdictions. The *Brown* opinion established the readmission standards for future cases and answered the question of what kind of offense might warrant permanent disbarment.

In addition, *Brown* reestablished the importance of considering the integrity of the bar and the effect of a reinstatement on public confidence.<sup>68</sup> The court noted that the common theme of prior disciplinary cases is that lawyers occupy a "special position" as ministers of the legal system.<sup>69</sup> The public, therefore, has a vital expectation of integrity in the bar and the administration of justice.<sup>70</sup> Maintenance of the bar's integrity is thus of vital importance, and

---

64. *Smith*, 166 W. Va. at 33, 270 S.E.2d at 774.

65. *In re Brown*, 166 W. Va. 226, 273 S.E.2d 567 (1980).

66. Bonn Brown's prior petition for reinstatement was remanded to the Committee on Legal Ethics. *Brown*, 164 W. Va. 234, 262 S.E.2d 444. See *supra* note 39.

67. *Brown*, 166 W. Va. at 228, 273 S.E.2d at 568.

68. *Id.*

69. *Id.* at 232, 273 S.E.2d at 570.

70. *Id.* at 232-33, 273 S.E.2d at 570.

“reinstatement of a disbarred attorney must be determined in part by ascertaining its impact on public confidence in the administration of justice and the integrity of the legal system.”<sup>71</sup> Having reiterated the importance of the public interest, the court stated the general rule:

[A] disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment, he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice, and in this regard the seriousness of the conduct leading to disbarment is an important consideration.<sup>72</sup>

The *Smith* opinion held that an order of permanent disbarment, after an applicant had already suffered the legal penalty, would merely “heap additional punishment upon the offending attorney.”<sup>73</sup> Implicit in the *Smith* holding is the idea that once an offending attorney has paid the legal penalty, there should be a presumption of rehabilitation.<sup>74</sup> The *Brown* opinion rejected any such presumption in favor of the petitioner. Instead, the Supreme Court of Appeals held that rehabilitation must be determined by a course of conduct that assures the court that it is probable that a reinstated attorney will not repeat unprofessional conduct.<sup>75</sup>

The court reiterated the importance of the nature of the offense resulting in disbarment by saying “the more serious the nature of the underlying offense, the more difficult the task becomes to show a basis for reinstatement.”<sup>76</sup>

The court also reestablished the deference given to recommendations of the Ethics Committee by holding that “absent a showing of some mistake of law or arbitrary assessment of the facts such

---

71. *Id.* at 233, 273 S.E.2d at 570.

72. *Id.* at 234, 273 S.E.2d at 571.

73. *In re Smith*, 166 W. Va. 22, 27, 270 S.E.2d 768, 771 (1980) (opinion withdrawn).

74. Indeed, this is an express point in the withdrawn opinion that was omitted from the revised opinion. *Smith*, 166 W. Va. at 30-31, 270 S.E.2d at 773. See also *In re Smith*, No. 13493, slip op. at 6 (W. Va. Nov. 25, 1980).

75. *Brown*, 166 W. Va. at 234, 273 S.E.2d at 571.

76. *Id.*



recommendations made by the Ethics Committee . . . are to be given substantial consideration.”<sup>77</sup> The Court recognized that the expertise and position of the Ethics Committee warrant deferential consideration.

Finally, the Supreme Court of Appeals returned to the facts of the case to consider the nature of the underlying offense that led to disbarment. For the first time, the court would consider a petition for reinstatement where the principles of law were well developed, the procedural law had been followed as developed, and the underlying offense was a serious felony.<sup>78</sup> Furthermore, the offense involved the perversion of the justice system, which every lawyer has a sacred duty to honor and preserve.<sup>79</sup>

The Supreme Court of Appeals quoted from several disbarment and reinstatement cases to show the gravity of the offense and reveal the court’s sentiment that if there is any offense so serious as to warrant permanent disbarment, bribery of a juror must be it.<sup>80</sup> The court was finally confronted with an offense which it considered so serious that it could not in good conscience allow reinstatement.

The court contended that it was unaware “of any case where an attorney convicted of bribing a juror has been reinstated.”<sup>81</sup> The court conceded, however, that an attorney was reinstated after a conviction of perjury in *Hiss*,<sup>82</sup> but noted that the attorney in that case had been disbarred for 22 years and had the benefit of favorable findings of the Massachusetts Board of Bar Overseers.

In the instant case however, the petitioner’s plight was aggravated by the fact that he had entered a plea of *nole contendere* and was convicted of an additional crime involving moral turpitude, that of bribing public officials of the State of West Virginia.<sup>83</sup>

77. *Id.* at 236, 273 S.E.2d at 572.

78. See *supra* note 38.

79. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1987).

80. *Brown*, 166 W. Va. at 236-37, 273 S.E.2d at 572 (quoting *In re Barron*, 155 W. Va. 98, 102, 181 S.E.2d 273, 275 (1971), and *In re Keenan*, 314 Mass. 544, 548-49, 50 N.E.2d 785, 787-88 (1943)).

81. *Brown*, 166 W. Va. at 237, 273 S.E.2d at 573.

82. *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975).

83. *Brown*, 166 W. Va. at 238-39, 273 S.E.2d at 573.

The court ultimately held that

[b]ecause of the extremely serious nature of applicant's original offense of bribing a juror when coupled with the separate conviction of conspiring to bribe public officials, we cannot help but conclude that his reinstatement would have a justifiable and substantial adverse effect on the public confidence in the administration of justice . . . .

We have held in *Smith* that the seriousness of the underlying offense leading to disbarment may, as a threshold matter, preclude reinstatement such that further inquiry as to rehabilitation is not warranted. The offenses involved in this case manifestly meet this test and for this reason applicant's petition for reinstatement is denied.<sup>84</sup>

The review was complete after determination that the offense was so egregious and violative of the principles of legal integrity that public confidence would necessarily be harmed by reinstatement. The Supreme Court of Appeals did not consider the possibility of petitioner's rehabilitation and gave no indication as to whether or not future rehabilitation might make his reinstatement possible.

A reasonable interpretation of the opinion leads to the conclusion that conviction of certain felonies, such as ones involving bribery of jurors and fundamental perversion of the justice system, will almost certainly preclude the possibility of reinstatement.

After *Brown*, a convicted felon may still reapply for a license to practice law and petition for reinstatement to the bar. As a preliminary matter, however, the court will consider the nature of the underlying offense and whether the offense is one that strikes at the very heart of the justice system. The court will weigh heavily whether reinstatement would necessarily harm public confidence in the integrity of the bar and the justice system.

The court will consider each case on its own facts and will give considerable weight to the recommendation of the Ethics Committee. However, if the underlying offense is such that reinstatement would adversely affect public confidence in the administration of justice and integrity of the bar, the court will not consider the factors that determine rehabilitation, but will deny reinstatement as a matter of duty.

---

84. *Id.* at 239-40, 273 S.E.2d at 574.

### III. HISTORICAL OVERVIEW OF REINSTATEMENT LAW

#### A. *Early Cases—Principles and Practice*

Three general rules were recognized as early as fifty years ago: a "lax rule," "a strict rule," and a "reasonable middle rule."<sup>85</sup> The distinction lay in whether disbarment was considered necessarily a permanent condition or whether the circumstances of the individual case determined permanency. Most courts considered that disbarment is not necessarily a permanent condition and recognized the right of disbarred attorneys to petition for reinstatement.<sup>86</sup> Jurisdictions within this category will follow either the "lax rule" or "reasonable middle rule."

Courts employing the liberal "rule of laxity" consider the petition for reinstatement equivalent to an original application for admission and base readmission on the same standards.<sup>87</sup> Those states employing the "reasonable middle rule" are unwilling to forever preclude a convicted wrongdoer from returning to a former position of trust on the theory that wrongdoers should be given a second chance upon proof of reformation.<sup>88</sup> Courts that follow the "middle rule" still require, however, that the petitioner satisfy the burden of proving rehabilitation and competency before reinstatement will be granted.<sup>89</sup>

---

85. *In re Stump*, 272 Ky. 593, 597, 114 S.W.2d 1094, 1096 (1938). Kentucky appears to be an anomaly in that the court professes to fall within the category of jurisdictions that adhere to the "reasonable middle rule" despite "section 97, Kentucky Statutes, [which declares] that no person convicted of treason or felony shall be permitted to practice law in any court as counsel or attorney at law." *Id.* at 596, 114 S.W.2d at 1096. Moreover, the court cites its previous holdings which state that even a pardoned felon cannot be reinstated, because "relief from the penal consequences of his act does not reinvest in the man those qualities of good character so essential for an attorney at law to possess." *Id.*

86. The court noted, "[i]t is a well-settled principle that disbarment is not *res adjudicata* or necessarily permanent, and that a disbarred attorney may be reinstated for reasons satisfactory to the court." *Id.* at 596, 114 S.W.2d at 1096.

87. *Id.* at 593, 114 S.W.2d at 1094.

88. *Id.*

89. In *Stump*, a Kentucky statute precluding reinstatement to the bar of convicted felons was held not applicable because the petitioner had not been convicted by a jury. Nevertheless, the petition for reinstatement was denied. The petitioner, who had been disbarred for accepting bribes to alter a prosecution while serving as prosecuting attorney, was denied reinstatement because he failed to convince the court of his rehabilitation. Nevertheless, the court expressly maintained its contention that the petitioner was not forever precluded from reinstatement upon a proper showing of reformation. *Id.*

General standards by which to judge the qualifications of a petitioner for reinstatement were laid out in *In re Stump* as follows:

[I]f the disbarred attorney can prove after the expiration of a reasonable length of time that he appreciates the significance of his derelictions; has lived a consistent life of probity and integrity, and shows that he possesses that good character necessary to guarantee uprightness and honor in his professional dealings and the faithful discharge of his duties as a lawyer, and therefore is worthy to be restored, the court will so order.<sup>90</sup>

Louisiana provides an example of the "strict rule", as shown by the opinion of *In re Wolff*.<sup>91</sup> The Supreme Court of Louisiana acknowledged that, even though it had inherent power to revoke a decree of disbarment, it "would not be disposed to exercise that power, no matter how sympathetic the members of the court might be, unless perhaps, on being convinced that an error was committed, or an injustice done, in rendering the decree of disbarment."<sup>92</sup> Even though the petitioner in *Wolff* proved to the court's satisfaction that he had atoned for his wrongs and was of good character, the court steadfastly refused to let "sympathies stand in the way of . . . responsibilities" and denied reinstatement.<sup>93</sup>

In the year following *Wolff*, the Supreme Court of Louisiana reaffirmed its non-reinstatement policy in *State v. Gowland*.<sup>94</sup> In *Gowland*, the court denied a petition for reinstatement, even though the petitioner had received a pardon and reestablished his good citizenship and reputation.<sup>95</sup> The petitioner applied for reinstatement six years later also, but the application was again refused.<sup>96</sup>

In the early cases, statutes typically mandated disbarment of attorneys convicted of a felony, but the statutes made no provision

90. *Id.* at 599, 114 S.W.2d at 1097.

91. *In re Wolff*, 173 La. 257, 136 So. 583 (1931).

92. *Id.* at 258, 136 So. at 584. The petitioner was disbarred for repeated acts of moral turpitude arising from the gross professional misconduct of misappropriating clients' funds. *In re Wolff*, 165 La. 641, 115 So. 809 (1928).

93. *Wolff*, 173 La. at 258, 136 So. at 584.

94. *State v. Gowland*, 174 La. 351, 140 So. 500 (1932).

95. *Id.* The court cited the Rules of the Court which state that "when a member of the bar has been disbarred because of his having been convicted of a felony, and is afterwards pardoned, 'the court, upon application, may vacate or modify such order of disbarment.'" *Id.* at 353-54, 140 So. at 501.

96. *State v. Gowland*, 189 La. 80, 179 So. 41 (1938).

for reinstatement. When courts denied reinstatement, denial was usually based on the lack of statutory power to reinstate. If a court held that reinstatement was within its inherent power, but nevertheless denied reinstatement, then the court did so based on its duty to protect the public from unscrupulous lawyers.<sup>97</sup>

### *B. Recent Trend—Principles and Policies*

The trend in recent decades has been for states to abolish statutes which require permanent disbarment and replace them with State Bar rules under the control of the judiciary. The bar rules may still require disbarment upon conviction of a crime of moral turpitude, but the rules include procedures designed to provide the attorney with the opportunity to be heard and to enable the court to judge each case on its own merits.<sup>98</sup>

The general rule is that disbarment is not intended, in all cases, to permanently preclude reinstatement.<sup>99</sup> The courts that unequivocally reject the concept of permanent disbarment have tended to

97. See, e.g., *Wolff*, 173 La. 257, 136 So. 583; *Ex parte Mitchell*, 123 W. Va. at 283, 290, 14 S.E.2d 771, 774 (1941); *In re Stump*, 272 Ky. 593, 596, 114 S.W.2d 1094, 1096 (1938); *People v. Buckles*, 167 Colo. 64, 453 P.2d 404 (1969).

98. Colorado, Kentucky and West Virginia are examples of states that formerly applied strict rules based on statutory mandates but have replaced the strict statutes with procedures that allow discretion by their supreme courts.

Part 17 of article 10 of title 39 of the Colorado Revised Statutes 1963, which prohibited any person convicted of a felony from practicing law in any court in the state, was repealed in 1972 after being on the books in one form or another since 1868, eight years before statehood.

Section 100 of chapter 30 of the Kentucky Revised Statutes was repealed in 1948. The statute declared that "[n]o person convicted of a felony shall be permitted to practice law in any court." See *In re May*, 249 S.W.2d 798 (Ky. 1952).

Chapter 30, article 2, section 7 of the West Virginia Code was enacted in 1923 to allow any West Virginia court of record to suspend or annul the license of an attorney for malpractice. Section 30-2-7 was superseded in 1945 by § 51-1-4a and by the By-Laws of the State Bar and their amendments and, also, the 1974 amendments to article VIII of the West Virginia Constitution. *Carey v. Dostert*, 294 S.E.2d 137, 138 (W. Va. 1982).

Based on *Carey*, chapter 30, article 2, section 6 of the West Virginia Code which mandates annulment of an attorney's license upon conviction of a felony, is probably obsolete as well, being superseded by article 6, § 23 of the By-Laws of the State Bar. Both chapter 30, article 2 of the West Virginia Code and article 6, section 23 of the State Bar By-Laws mandate annulment of an attorney's license upon conviction of a crime involving moral turpitude. The latter section, however, is a Court Rule under the control of the Supreme Court of Appeals.

99. Annotation, *Reinstatement of Attorney After Disbarment, Suspension, or Resignation*, 70 A.L.R.2d 268, § 3 (1960).

focus on the uncertainty inherent in the balancing process and the ever-present possibility of true reform by the individual petitioner.<sup>100</sup> The majority view undoubtedly should be considered the “reasonable middle rule” as described in *Stump*<sup>101</sup> and perhaps represented by *Hiss*.<sup>102</sup>

The rationale underlying the “reasonable middle rule” is based on a fundamental precept of the legal and correctional system; rehabilitation and reform are always possible and should be rewarded under proper circumstances.<sup>103</sup> Basic fairness to the errant individual requires that the opportunity be given to provide proof of regeneration and fitness which warrant readmission to the bar.<sup>104</sup> The *Hiss* factors are designed to make it possible for the errant attorney to prove that he has the moral qualifications and competency required for readmission.<sup>105</sup>

One group of states that generally follows the “reasonable middle rule” differs in its focus on the severity and egregiousness of the offense. This group of states holds that certain offenses are, by their very nature, so severe and egregious as to permanently bar reinstatement. This group places higher importance on the adverse effect on public confidence in the integrity of the bar and the administration of justice when attorneys convicted of serious felonies are reinstated.<sup>106</sup>

Offenses sufficient by their very nature to preclude reinstatement are rarely encountered and are usually identified by inference and

100. See, e.g., *In re Raimondi*, 285 Md. 607, 617, 403 A.2d 1234, 1239 (1979) (“[t]here may be a point in time when it is proper to reinstate to the practice of law even one who has committed a most heinous crime.”), *cert. denied*, 444 U.S. 1033 (1980); *In re Hiss*, 368 Mass. at 447, 333 N.E.2d 429, 433 (1975) (“[w]e cannot now say that any offense is so grave that a disbarred attorney is automatically precluded from attempting to demonstrate through ample and adequate proofs . . . that he has achieved a ‘present fitness’ . . . to serve as an attorney . . . in spite of his previous actions.” (citation omitted)).

101. *In re Stump*, 272 Ky. 593, 114 S.W.2d 1094 (1938). See also the textual discussion at III.A of this paper.

102. *Hiss*, 368 Mass. 447, 333 N.E.2d 429.

103. *In re Allen*, 400 Mass. 417, 509 N.E.2d 1158 (1987).

104. *Id.*

105. *Hiss*, 368 Mass. at 456, 333 N.E.2d at 436. See *supra* notes 46-47 and accompanying text.

106. See generally Comment, *Attorney Reinstatement Standards: A Proposal for Reform in Washington State*, 62 WASH. L. REV. 723 (1987) (authored by Anne Badgley). See also *In re Brown*, 166 W. Va. 226, 273 S.E.2d 567 (1980).

generalities. Among the states that express the view that certain offenses may preclude reinstatement are Illinois,<sup>107</sup> Kansas,<sup>108</sup> Minnesota,<sup>109</sup> Vermont,<sup>110</sup> and West Virginia.<sup>111</sup>

Courts that follow the "strict rule" agree with the proposition that disbarment for felony convictions and other crimes of moral turpitude should be permanent. Among the jurisdictions that follow the "strict rule" are the District of Columbia,<sup>112</sup> New York,<sup>113</sup> possibly Utah,<sup>114</sup> and Louisiana.<sup>115</sup> Statutory mandate typically controls in jurisdictions that follow the "strict rule." However, regardless of whether the basis is statutory or common law, the underlying rationale is always concern for protecting the public from the dishonest lawyer. It might be surmised that part of the rationale is

107. *In re Rothenberg*, 108 Ill.2d 313, 326, 484 N.E.2d 289, 295 (1985) ("Clearly, there are certain infractions that are so serious that the attorney committing them should never be readmitted to the practice of law.").

108. *State v. Russo*, 230 Kan. 5, 10, 630 P.2d 711, 715 (1981) ("[T]he seriousness of the underlying offense leading to disbarment may, as a threshold matter, preclude reinstatement such that further inquiry as to rehabilitation [of the petitioner] is not warranted.") (quoting *In re Brown*, 166 W. Va. 226, 240, 273 S.E.2d 567, 574 (1980)).

109. *In re Van Wyck*, 225 Minn. 90, 90, 29 N.W.2d 654, 654-55 (1947) (The court refused even to appoint a referee to take testimony on the reinstatement petition "[o]n account of the heinous moral turpitude of the offense of which the applicant was convicted and . . . disbarred . . .").

110. *In re Harrington*, 134 Vt. 549, 555, 367 A.2d 161, 165 (1976) (The court agreed that "there may be an 'unforgiveable' [sic] crime, a crime for which readmission to practice, by the very nature of the wrong, could not be justified.").

111. *In re Brown*, 166 W. Va. 226, 240, 273 S.E.2d 567, 574 (1980) ("[T]he seriousness of the underlying offense leading to disbarment may, as a threshold matter, preclude reinstatement such that further inquiry as to rehabilitation is not warranted.").

112. *In re Kerr*, 424 A.2d 94 (D.C. 1980). The District of Columbia Court of Appeals held that title 11, Chapter 2503(a) of the District of Columbia Code Annotated § 11-2503(a) (1973), precludes reinstatement except in the event a pardon is granted. The court held the statute to be consistent with title 11, chapter 2501 of the District of Columbia Code Annotated (1973), which the court interpreted as granting authority over "original admission" but not over reinstatement. *Kerr*, 424 A.2d 98.

113. Section 90 of The New York Judiciary Law (McKinney 1983) requires automatic disbarment of an attorney upon conviction of a felony but allows the court discretion in reinstatement upon reversal of the felony conviction. *In re Sugarman*, 64 A.D.2d 166, 168, 409 N.Y.S.2d 224, 226 (1978). See also *Barash v. Association of Bar of City of N.Y.*, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967).

114. Although no Utah case law interprets the statute, title 78, chapter 51, section 37 of the Utah Code requires disbarment upon conviction of a felony and may be interpreted as to preclude subsequent reinstatement.

115. See, e.g., *Gowland*, 174 La. 351, 140 So. 500; *Wolff*, 173 La. 257, 136 So. 583. No recent authority clearly shows a changed attitude in Louisiana concerning reinstatement of former convicted felons.

based on the belief that character is static.<sup>116</sup> Therefore, once a person is shown to be dishonest by a felony conviction, the presumption cannot be rebutted by subsequent conduct.

#### IV. ADMISSION OF FIRST-TIME APPLICANTS WITH FELONY RECORDS

##### A. *What Standards Determine Good Moral Character?*

Common sense might lead one to believe that standards for readmission of a disbarred felon should also apply to first-time applicants with felony records. The question is basically the same, whether the person is a "fit and proper person to be permitted to practice law [or] likely to continue to commit acts of moral turpitude."<sup>117</sup> Some courts do, however, apply a more lenient standard in the case of first-time applicants.<sup>118</sup> Other courts expressly apply the same standard used for reinstatement proceedings,<sup>119</sup> and at least one court applies the standard used in disbarment cases.<sup>120</sup>

##### 1. Examples of Standards Considered By Courts.

The District of Columbia Court of Appeals applied a more lenient standard to first-time applicants in *In re Manville*,<sup>121</sup> because

116. See, e.g., *In re Wright*, 102 Wash. 2d 855, 874, 690 P.2d 1134, 1144 (1984) (Williams, C.J., dissenting).

117. *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 453, 421 P.2d 76, 81, 55 Cal. Rptr. 228, 233 (1966).

118. E.g., *In re Dileo*, 307 So.2d 362 (La. 1975); *In re Manville*, 538 A.2d 1128 (D.C. 1988).

119. E.g., *In re Belsher*, 102 Wash. 2d 844, 689 P.2d 1078 (1984); *In re Estes*, 580 P.2d 977 (Okla. 1978).

120. *Hallinan*, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228.

121. *Manville*, 538 A.2d at 1135-36. In no uncertain terms the court said: "[w]e are satisfied that this court can adopt a rule for the admission of applicants who have committed felonies that differs from the rule it employs in connection with the application for readmission of a former attorney who was disbarred for committing a felony." *Id.* The distinction is "between members of the bar who are convicted of crimes of moral turpitude and bar applicants previously convicted of such crimes." *Id.* at 1136. In other words, an applicant who suffered a conviction prior to his first bar application is judged on a lesser standard because the conviction occurred while the applicant was not yet bound by an attorney's ethical obligations.

Another basis for the court's holding is that "while D.C. Code § 11-2501(a) (1981) gives this court plenary authority over the original admission of attorneys to the bar, no statute gives it plenary authority over readmission cases." *Id.* In addition, the court questioned the constitutionality of a *per se* rule that bars admission of convicted felons by stating that such a rule may be a violation of due process and equal protection. *Id.* at 1132.



“[t]he lawyer has a special duty as an officer of the court to uphold the law.” The lawyer takes an oath to uphold the law; therefore, criminal conduct by a lawyer is “more reprehensible than similar conduct by lay persons . . . .”<sup>122</sup> Although the lawyer’s oath distinguishes the reinstatement case from an initial application, the court, nevertheless, applied standards to first-time applicants that are essentially the same as the *Hiss* standards commonly used in reinstatement proceedings. The factors considered by the court were as follows:

- 1) the nature and character of the offenses committed;
- 2) the number and duration of offenses;
- 3) the age and maturity of the applicant when the offenses were committed;
- 4) the social and historical context in which the offenses were committed;
- 5) the sufficiency of the punishment undergone and restitution made in connection with the offenses;
- 6) the grant or denial of a pardon for offenses committed;
- 7) the number of years that have elapsed since the last offense was committed, and the presence or absence of misconduct during that period;
- 8) the applicant’s current attitude about the prior offenses (*e.g.*, acceptance of responsibility for and renunciation of past wrongdoing, and remorse);
- 9) the applicant’s candor, sincerity and full disclosure in the filings and proceedings on character and fitness;
- 10) the applicant’s constructive activities and accomplishments subsequent to the criminal convictions; and

---

122. *Id.* at 1136. Although the court appears to be sanctioning a double standard, it may be explained by noting its acquiescence to statutory authority on the issue of readmission where most courts assert judicial authority. On the subject of admission, the court merely applies the majority view that fitness to practice law must be determined on a case-by-case basis, after consideration of many factors.

11) the opinions of character witnesses about the applicant's moral fitness.<sup>123</sup>

Louisiana is another state where a distinction is ostensibly made between the applicable standards.<sup>124</sup> The Supreme Court of Louisiana expressly "rejects a rigid rule that transgressions of a non-lawyer when he is later considered for moral fitness to be admitted to the Bar are analogous to the disciplinary rules and sanctions applicable to licensed attorneys."<sup>125</sup> The Supreme Court of Louisiana left open the possibility, however, that conduct of a certain "degree of moral turpitude" might preclude a petitioner from admission forever.<sup>126</sup>

Along with the foregoing jurisdictions, New York also seems to apply a lesser standard to first-time applicants than to petitioners for reinstatement.<sup>127</sup>

The leniency of the foregoing jurisdictions may be a direct result of their jurisdictional situations. That is, their attempts to distinguish the two standards may be a conscious effort to apply a more lenient, discretionary standard to initial applicants because discretion is not available to them in reinstatement proceedings. Accordingly, in admissions proceedings, the foregoing jurisdictions expressly reject the "strict standard" in favor of the more lenient majority standards. As stated in *In re Dileo*, "[w]e prefer to consider the facts of each case on the basis of the totality of the circumstances which brings the applicant before us."<sup>128</sup>

On the contrary, the Supreme Court of Florida applies a stricter standard to admissions applications than that applied in disciplinary and reinstatement proceedings.<sup>129</sup> The standard for determining good moral character for purposes of first-time admission considers not

---

123. *Id.* at 1133 n.4. See also Comment, *Past Crimes and Admission to the Bar*, *supra* note 18, for a very similar list of nine considerations used by the California Committee of Bar Examiners to evaluate the moral character of an applicant.

124. *In re Dileo*, 307 So.2d 362 (La. 1975).

125. *Id.* at 364.

126. *Id.* at 365.

127. *In re Kesselman*, 100 A.D.2d 606, 473 N.Y.S.2d 826 (1984).

128. *Dileo*, 307 So.2d at 364.

129. *In re Florida Board of Bar Examiners*, 373 So.2d 890 (Fla. 1979).

only acts that involve moral turpitude, but conduct that would cause a reasonable person to have substantial doubts about the applicant's "honesty, fairness and respect for the rights of others and for the laws of the state and nation."<sup>130</sup> The Supreme Courts of Oklahoma<sup>131</sup> and Washington<sup>132</sup> expressly apply reinstatement standards to admissions proceedings, whereas the Supreme Court of New Jersey<sup>133</sup> implicitly applies reinstatement standards without distinguishing between the two situations.

In the case of *In re Belsher*, the Supreme Court of Washington gives two reasons for applying reinstatement standards to first-time applicants as well. The first reason is because of "the absence of reported decisions in [the] jurisdiction dealing with the nature of an initial applicant's burden to demonstrate good moral character . . . ."<sup>134</sup> The second reason is based on "the common purpose underlying both reinstatement and admission proceedings . . . ."<sup>135</sup>

The position of initial applicants and candidates for reinstatement is very similar where both have records of serious misconduct; therefore, the Supreme Court of Washington holds that it is "reasonable to require of each similar burdens of proof with respect to whether such conduct is likely to occur again."<sup>136</sup>

The Supreme Court of Oklahoma appears to apply reinstatement standards for fairness reasons. The court pointed out, in *In re Estes*, that attorneys disbarred for crimes of moral turpitude could petition for reinstatement after five years and "[s]urely the same consideration should be afforded [the initial] applicant."<sup>137</sup>

The Supreme Court of California appears to be a maverick by equating admission standards with standards applied in disciplinary

---

130. *Id.* at 892 (quoting *Florida Board of Bar Examiners re G.W.L.*, 364 So.2d 454, 458 (Fla. 1978)).

131. *In re Estes*, 580 P.2d 977 (Okla. 1978).

132. *In re Belsher*, 102 Wash. 2d 844, 689 P.2d 1078 (1984).

133. *In re Matthews*, 94 N.J. 59, 462 A.2d 165 (1983).

134. *Belsher*, 102 Wash. 2d at 850, 689 P.2d at 1082.

135. *Id.* at 851, 689 P.2d at 1082.

136. *Id.* at 852, 689 P.2d at 1083.

137. *Estes*, 580 P.2d at 980.

proceedings.<sup>138</sup> However, once the court affirmed that the applicant has the burden of proving fitness,<sup>139</sup> it was clear that the court actually applied the readmission standard rather than the disciplinary standard.

## 2. Key Factors Considered By Courts In Admissions Proceedings.

Several key factors are often cited by courts, regardless of whether the court is denying or approving an application for admission. For instance, courts require applicants to be candid in the entire application process.<sup>140</sup> Except when constitutionally protected answers are solicited by the bar examiners,<sup>141</sup> applicants must answer fully and truthfully, neither minimizing nor hiding criminal records and misdeeds.<sup>142</sup>

The Board of Examiners and the court view any attempt by an applicant to mislead the Board as equivalent to blatant dishonesty. Creating false impressions raises a very strong presumption of bad moral character and unfitness to practice law because such conduct is likely to continue in the applicant's professional career.<sup>143</sup>

Expressions of remorse by the applicant who has committed serious crimes are considered an important indicator of rehabilitation.<sup>144</sup> Lack of express evidence of sorrow or repentance during the application process shows lack of reform and a greater probability that past misdeeds will continue.

---

138. *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

139. *Id.* at 450, 421 P.2d at 80, 55 Cal. Rptr. at 232.

140. See Annotation, *Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing On Requisite Good Moral Character for Admission to Bar*, 30 A.L.R. 4TH 1020, § 5 (1984). *In re Matthews*, 94 N.J. 59, 82, 462 A.2d 165, 176 (1983).

141. *Pushinsky v. West Virginia Bd. of Law Examiners*, 164 W. Va. 736, 266 S.E.2d 444 (1980).

142. *In re Elkins*, 308 N.C. 317, 302 S.E.2d 215 (1983), *reh'g denied*, 308 N.C. 681, 311 S.E.2d 590 (1983); *In re Moore*, 308 N.C. 771, 303 S.E.2d 810 (1983); *In re Belsher*, 102 Wash. 2d 844, 689 P.2d 1078 (1984); *Lark v. West*, 182 F. Supp. 794, 798 n.3 (D.D.C. 1960), *aff'd*, 289 F.2d 898, 110 U.S. App. D.C. 157 (1961), *cert. denied*, 368 U.S. 865 (1961).

143. See generally Annotation, *Admission to Bar — Good Moral Character*, 30 A.L.R. 4TH 1020, § 5 (1984).

144. *Belsher*, 102 Wash. 2d at 853, 689 P.2d at 1084; *In re Wright*, 102 Wash. 2d 855, 859, 690 P.2d 1134, 1136 (1984).

Courts consider the pattern of the applicant's conduct since the conviction to be strong evidence of moral character at the time of application.<sup>145</sup> For example, evidence that an applicant was an unruly prisoner while incarcerated will weigh heavily against a finding of reformation.<sup>146</sup> Evidence that the applicant committed even minor offenses during the interim since conviction will also weigh heavily against a finding of rehabilitation.<sup>147</sup>

Courts note other factors, to a lesser extent, that contribute to a finding of present fitness.<sup>148</sup> However, if one factor implicitly weighs heavier than all others and provides a solution to the puzzle of good moral character, it would have to be sincere rehabilitation.

Courts try to find that rehabilitation has occurred and, generally, will examine all the evidence which an applicant presents. Based on due process requirements, refusal to give an applicant, at a minimum, a fair hearing may be a thing of the past.<sup>149</sup> Even if an application is denied because a serious offense is in the applicant's record, it is not uncommon for courts to acknowledge the possibility of subsequent admission. In cases where sincere rehabilitation is present, all other factors will probably work to outweigh any negative evidence.

It stands to reason that a person who is sincerely rehabilitated will usually have friends and acquaintances who will convincingly testify in his behalf. If the applicant is sincerely rehabilitated, courts will probably recognize it. Subjectivity should not work against the applicant who is sincerely rehabilitated.

Just as in the readmission context, courts rarely speak of specific crimes that preclude admission for the first-time applicant. The se-

---

145. See, e.g., *In re Haukebo*, 352 N.W.2d 752, 755 (Minn. 1984).

146. *In re G.L.S.*, 586 F. Supp. 375 (D. Md. 1984), *aff'd*, 745 F.2d 856 (4th Cir. 1984).

147. See, e.g., *Nall v. Board of Bar Examiners*, 98 N.M. 172, 646 P.2d 1236 (1982).

148. E.g., *In re Taylor*, 293 Or. 285, 647 P.2d 462 (1982) (discharge of student loans in bankruptcy without extraordinary hardship); *Belsher*, 102 Wash. 2d at 853, 689 P.2d at 1084 (absence of continuing record of progress regarding psychological ailment); *In re G.S.*, 291 Md. 182, 433 A.2d 1159 (1981) (insufficient evidence presented).

149. E.g. *In re Van Wyck*, 225 Minn. 90, 90, 29 N.W.2d 654, 654-55 (1947) ("On account of the heinous moral turpitude of the offense [causing disbarment], this court would not be justified in appointing a referee to take testimony in support of or in opposition to the application for reinstatement and would not be justified in reinstating the applicant . . .").

verity of the actual crime is, of course, considered, but it is only one factor among many. Rehabilitation is supreme, for this is what determines the future conduct of the applicant and persuades the court to admit the applicant to the practice of law.

### 3. Constitutional Limitations on Admissions Standards

The states and their courts traditionally exercise exclusive control over the standards for admission and readmission.<sup>150</sup> The vast majority of jurisdictions adopt some combination of the factors enumerated in *Manville*.<sup>151</sup> In general, states can require that an applicant possess integrity and high moral character, notwithstanding the inherent vagueness of those terms. However, constitutional limitations do apply. The United States Supreme Court has held that state admission standards must rationally relate to fitness or capacity to practice law.<sup>152</sup>

Unfortunately, the constitutional limitation is almost as vague as the standards themselves. For example, how does one determine whether a felony committed outside the practice of law will necessarily impair the ability to practice law?<sup>153</sup> Is a person unfit to practice law because he committed a “victimless” crime? Perhaps the distinction between types of criminal conduct is necessitated by the increase in statutory felonies that are relatively victimless in comparison to traditional common law felonies.

The issue has been addressed in terms of “illegal” conduct versus “criminal” conduct.<sup>154</sup> The distinction is recognized and addressed in the Model Rules as follows:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income

---

150. *In re Isserman*, 345 U.S. 286, 287 (1953), *rev'd*, 348 U.S. 1 (1954).

151. See generally Annotation, *Falsehoods, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing On Requisite Good Moral Character for Admission to Bar*, 30 A.L.R. 4TH 1020, § 4 (1984); Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 88 A.L.R. 3D 192, § 2 (1978); 7 AM. JUR. 2D *Attorneys of Law* § 16 (1980).

152. *Schwartz v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957).

153. McChrystal, *supra* note 16, at 91.

154. *Id.* at 86.

tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.<sup>155</sup>

Compare the general requirement of EC 1-3, that an applicant be of good moral character,<sup>156</sup> with the Model Rules requirement, that the applicant tell the truth and correct any misunderstandings that arise during the admissions process.<sup>157</sup> The comparison reveals quite a contrast in the requirements.

Actually, a person may be considered immoral by one person's standards but yet be a very fine lawyer. However, a person who is dishonest in the admissions process would probably continue to be dishonest in the practice of law.

The importance of the holding in *Schware v. Board of Bar Examiners of the State of New Mexico*, may lie more in its restriction on the use of presumptions than in any fundamental change in the standards themselves. Good moral character is still a valid requirement for admission to the bar, but, more importantly, good moral character *at the time of application* for admission.<sup>158</sup> In order to determine whether an applicant's moral character is good at the time of application, a court must consider all the relevant circumstances surrounding the felony conviction.

The applicant must meet a heavy burden when attempting to prove rehabilitation, although it might require only a preponderance of the evidence.<sup>159</sup> Even though a felony conviction provides evidence

---

155. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 comment (1987).

156. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-3 (1981).

157. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.1 (1987).

158. See generally Annotation, *Falsehood, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing On Requisite Good Moral Character for Admission to Bar*, 30 A.L.R. 4TH 1020, § 4 (1984).

159. *In re Manville*, 538 A.2d 1128, 1134 (D.C. 1988). Cf. *In re Belsher*, 102 Wash. 2d 844, 851, 689 P.2d 1082, 1083 (1984) (convincing proof of full and complete rehabilitation).

of “moral turpitude,” “a rule denying bar admission to all applicants who have felony convictions might contravene constitutional guarantees of due process or equal protection of the laws.”<sup>160</sup>

The same rationale which underlies the “reasonable middle rule”<sup>161</sup> in the reinstatement context provides a justification for considering first-time applicants who have felony convictions as valid candidates for admission; rehabilitation is always possible, and justice requires that errant citizens be afforded the opportunity to prove themselves. Furthermore, it is good social policy to reward those who have rehabilitated themselves as an incentive for others to strive for self-improvement.

Furthermore, determinations of fitness and good moral character are necessarily subjective and are by their nature difficult to predict. Some consider the process of *ad hoc* evaluation of present moral character unfair because it provides little guidance to potential applicants who have gone astray in bygone years.<sup>162</sup>

However, rather than return to the “fairness” of *per se* rules, the present discretionary standards should be continued and allowed to evolve over time, even as the common law evolves over time. The advantage (which could also be considered a disadvantage) lies in the flexibility of discretionary determination. If *per se* rules tend to work injustice, it stands to reason that discretion would tend to work toward justice when exercised judiciously. But more importantly, discretionary rules will change to reflect the mores of society and the community.

#### 4. What Offenses Involving Moral Turpitude May Preclude Admission to the Bar?

The Supreme Court of Washington and the Supreme Court, Appellate Division, New York, provide an answer to the question of whether any crime may preclude admission. The applications of con-

---

160. *Manville*, 538 A.2d at 1132.

161. See textual discussion at III.

162. E.g., Comment, *Past Crimes and Admission to the Bar*, 5 J.L. PROF. at 188 (1980) (authored by Laura Gunn).



victed murderers were denied in *In re Wright*<sup>163</sup> and *In re Roger "MM."*<sup>164</sup> However, even *Wright* does not clearly hold that second degree murder will always preclude admission to the bar.

The dissent sharply criticized the majority's opinion as evidencing "an inflexible rejection of the view that a person can redeem himself from past violations and can work to become a useful and productive citizen."<sup>165</sup> The dissent's criticism appears to be well-taken, based on the majority's remark that it had found no case where a convicted murderer had been admitted to the practice of law. The court's remark could be interpreted as support for its belief that a second degree murderer could not possibly rehabilitate himself sufficiently to be admitted to the bar, simply because no cases had yet reported such a finding.<sup>166</sup>

Considering the dissent's contention that the applicant had "proven himself worthy to be admitted to practice,"<sup>167</sup> one can consider the majority's rejection as less than absolute and probably based more on the views of the individual justices in the majority than on the moral turpitude of the offense. In fact, the majority expressly left open the possibility that the applicant could refile for admission in the future.<sup>168</sup>

First degree murder may be the offense that clearly precludes admission. In *Roger "MM,"* a brief memorandum decision states that the "petitioner's history of past criminal conduct, which includes convictions for bank robbery and first-degree murder, would operate to disqualify him, on character grounds, from being admitted to practice as an attorney [in] New York."<sup>169</sup> However, in *Roger "MM,"* the murder conviction was not the only serious offense in the applicant's record. Therefore, the holding does not lead to an absolute conclusion that a murder conviction, standing alone,

---

163. *In re Wright*, 102 Wash. 2d 855, 690 P.2d 1134 (1984).

164. *In re Roger "MM,"* 96 A.D.2d 1133, 466 N.Y.S.2d 873 (1983).

165. *Wright*, 102 Wash. 2d at 873, 690 P.2d at 1144 (Williams, C.J., dissenting).

166. *Id.* at 859, 690 P.2d at 1136.

167. *Id.* at 874, 690 P.2d at 1144 (Williams, C.J., dissenting).

168. *Id.* at 861-62, 690 P.2d at 1137.

169. *Roger "MM,"* 96 A.D.2d 1133, 466 N.Y.S.2d 873.

would operate to preclude admission to the bar. Unfortunately, the court gives no analysis in its decision.

### *B. The General State of the Law*

At present, case law presents a checkerboard of precedent when viewed on the surface. Nevertheless, good moral character is universally recognized as a vital prerequisite to admission,<sup>170</sup> and a felony conviction does not necessarily preclude one's admission to the bar.<sup>171</sup> Otherwise, hardly any other general rules can be drawn.

Courts consider a felony record an important factor when reviewing an initial applicant for admission. A felony conviction raises a rebuttable presumption of an unfit character, but, as in reinstatement cases, very few courts give this factor conclusive weight unless the felony involved such a degree of moral turpitude "that it should forever bar him from the practice of law . . . ."<sup>172</sup>

For example, evidence of theft, perjury, and dismissal of law student loans can warrant denial of admission even without conviction, especially where mitigating circumstances are few.<sup>173</sup> On the other hand, a conviction for conspiracy to import marijuana was not enough in an Oklahoma case to preclude admission, where the applicant met his burden of proving rehabilitation, current good character, and respect for the law.<sup>174</sup>

The United States District Court for Maryland refused to admit to its bar an applicant who had been convicted of armed bank robbery more than fifteen years prior to application.<sup>175</sup> The court held that a pardon would be necessary for his admission to its bar despite

---

170. Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 88 A.L.R. 3D 192, § 2 (1978).

171. 7 AM. JUR. 2D *Attorneys at Law* § 15 (1980).

172. *In re Dileo*, 307 So.2d 362, 365 (La. 1975). Apparently, as in reinstatement cases, it is easier to intimate such a crime exists than it is to state what such a crime might be. Note that the Supreme Court of Louisiana gave no indication of what degree of moral turpitude might forever bar one from the practice of law.

173. *In re Taylor*, 293 Or. 285, 647 P.2d 462 (1982). See also *In re G.S.*, 291 Md. 182, 433 A.2d 1159 (1981).

174. *In re Estes*, 580 P.2d 977 (Okla. 1978).

175. *In re G.L.S.*, 586 F. Supp. 375 (D. Md. 1984), *aff'd*, 745 F.2d 856 (4th Cir. 1984).

the applicant's admission into the Maryland State Bar.<sup>176</sup> By requiring the applicant to submit to the parole process, the court was assured that it would receive additional evidence with which to determine the applicant's reformation.<sup>177</sup>

In addition, the court held that any doubts about whether the "standard [for admission to the federal bar] has been met must be resolved in favor of the public."<sup>178</sup> In contrast, other courts resolve doubts in favor of the applicant.<sup>179</sup>

In *Manville*,<sup>180</sup> the felony convictions at issue included voluntary manslaughter, bank robbery, and sale of narcotics. The passage of over ten years since each of the convictions probably facilitated a successful rebuttal of the presumption of moral unfitness.<sup>181</sup> *Manville* is an example of how serious a criminal conviction can be and still be overcome by a sufficient record and solid evidence of rehabilitation.

Ultimately, the subjective nature of the inquiry into moral character will depend on the particular facts of the case. More importantly, however, the determination will depend upon the sympathies and outlook of the court. Hopefully, justice will always be of prime consideration as well as the integrity of the bar. Standards are certain to change over time, but when confidence in the judiciary suffers, the damage is difficult to repair. Respect for the judiciary and the legal system in general can hardly be overvalued as a vitally important element in the operation of our society.

## V. CONCLUSION

Although recent reinstatement decisions by the West Virginia Supreme Court of Appeals have been somewhat erratic and contro-

---

176. *Id.* at 380.

177. *Id.*

178. *Id.* at 379.

179. *Nall v. Board of Bar Examiners*, 98 N.M. 172, 646 P.2d 1236 (1982); *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

180. *In re Manville*, 538 A.2d 1128 (D.C. 1988).

181. *Id.*

versial,<sup>182</sup> the court appears to follow the majority view. The majority view holds that attorneys who are disbarred after a felony conviction can be reinstated to the bar upon a proper showing of moral rehabilitation and fitness to practice law.<sup>183</sup> The court also falls within the category of courts that holds certain offenses to be so reprehensible by their nature, as to preclude reinstatement.<sup>184</sup>

It appears likely that an attorney will be unable to satisfy the burden of proving the requisite moral qualifications for reinstatement after being convicted of more than one felony involving the perversion of the justice system or abuse of the political process. Furthermore, the burden of showing that reinstatement would not adversely affect public confidence in the justice system will probably be insurmountable, especially if the attorney's disbarment was surrounded by much press and public attention.

West Virginia has no recent case on record of a first-time applicant with a criminal record. However, based on the case of *In re Eary*,<sup>185</sup> decided in 1950, West Virginia's admission law appears to be consistent with the current majority view. In both reinstatement cases and first-time applications, the West Virginia Supreme Court of Appeals would not consider that any but the most heinous crimes constitute an absolute disqualification from the practice of law.

One of the disadvantages of sacrificing statutory proscriptions in favor of a balancing system is the difficulty of maintaining the consistency that is so vital for public confidence. When the public's

---

182. The vacillation is evident from the apparently smooth development in the law from *Ex parte Mitchell*, 123 W. Va. 283, 14 S.E.2d 771 (1941), to *In re Brown*, 166 W. Va. 226, 273 S.E.2d 567 (1980) and the intervening opinion and vehement dissent of *In re Smith*, 166 W. Va. 22, 270 S.E.2d 768 (1980) (opinion withdrawn). See *supra*, notes 16-71 and accompanying text. It is noteworthy that *Brown* emphasized the adverse affect on the public confidence in the justice system as part of its justification for denying reinstatement outright. *Brown*, 166 W. Va. 226, 273 S.E.2d 567.

183. See *supra* notes 46-60 and accompanying text.

184. See *supra* note 96.

185. A pertinent case is *In re Eary*, 134 W. Va. 204, 58 S.E.2d 647 (1950). In *Eary*, the petitioner's license had been annulled. He was, therefore, in the position of a first-time applicant seeking a license to practice. However, evidence showed the petitioner had been convicted of a crime of moral turpitude. The petitioner failed to prove to the court's satisfaction that he possessed good moral character and his petition was denied.

interest in the integrity of the bar and the administration of justice is just another factor to weigh in the balancing process, the public interest will occasionally end up on the light side of the scale. Courts change, however, and eventually corrections in the law can be made. Consistency may be impossible to attain but it can still be acceptable if the court will continue to emphasize the importance of the public interest in the administration of justice and public confidence in the integrity of the bar.

Adherence to the *Brown*<sup>186</sup> principles to judge reinstatement petitions and applications for first-time admission may provide a basis for future consistency that will promote public confidence in the justice system. Justice and constitutional due process considerations require that attorneys and applicants who have seriously erred be given the opportunity to prove reformation, but reality tells us that some crimes are intolerable and simply cannot be overcome.

*Leonard W. Copeland*

---

186. *Brown*, 166 W. Va. 226, 273 S.E.2d 567.